Filed 1/12/15 Gutierrez v. Girardi CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LUIS GUTIERREZ, Plaintiff and Appellant, v. THOMAS V. GIRARDI et al., Defendants and Respondents.	B251857 (Los Angeles County Super. Ct. No. BC400560)

APPEAL from an order of the Superior Court of Los Angeles County, William F. Highberger, Judge. Affirmed.

The Dion-Kindem Law Firm and Peter R. Dion-Kindem for Plaintiff and Appellant.

Law Offices of Martin N. Buchanan and Martin N. Buchanan for Defendants and Respondents.

INTRODUCTION

Plaintiff Luis Gutierrez sued his former attorneys, Girardi & Keese and Thomas Girardi (collectively, G&K), for breach of fiduciary duty, alleging G&K fraudulently mishandled settlement proceeds generated in toxic tort litigation against Gutierrez's former employer, Lockheed Corporation (the Lockheed Litigation). Gutierrez appeals from an order denying his motion to certify a class of G&K's former clients who likewise settled their claims in the Lockheed Litigation. Based on the small class size, consisting of no more than 26 members, and concerns over absent class members passively waiving the attorney-client privilege by not opting out of the class, the trial court determined a class action was not a superior method for adjudicating the breach of fiduciary duty claim. We conclude the trial court applied an appropriate legal standard and its finding was supported by substantial evidence. Accordingly, we affirm.

FACTS[1] AND PROCEDURAL BACKGROUND

1. *The Lockheed Litigation*

Gutierrez worked as a structural assembler, heat treater, and mechanic for Lockheed from 1973 through 2008. In March 1987, Gutierrez filed an application for workers' compensation benefits against Lockheed, alleging "stress [and] strain with toxic exposure" arising from his Lockheed employment. Gutierrez was ultimately successful in obtaining workers' compensation benefits.

In October 1988, Gutierrez, together with several other Lockheed workers, filed a civil action against Lockheed and various chemical manufacturers. The complaint alleged the plaintiffs had sustained personal injuries from their exposure to toxic chemicals while working at Lockheed's facilities. G&K associated as counsel in the Lockheed Litigation after the complaint was filed.

---

[1] In accordance with the applicable standard of review, we state the facts in the light most favorable to the trial court's findings. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436 (*Linder*).)

Between 1988 and 2002, the Lockheed plaintiffs reached settlements with several defendants in the Lockheed Litigation, totaling approximately $130 million. From October 1991 to February 2001, Gutierrez received 13 settlement checks totaling $81,310.41.

In April 2002, three nonsettling defendants in the Lockheed Litigation moved for summary judgment against Gutierrez, asserting his action was barred by the applicable one-year statute of limitations. The trial court granted the motion, concluding Gutierrez had "inquiry knowledge" of his claims against the defendants when he filed his workers' compensation claim against Lockheed more than a year before commencing the Lockheed Litigation.

2. *Gutierrez's Action Against G&K*

On October 23, 2008, Gutierrez filed the instant action against G&K on behalf of himself and a putative class of "[a]ll persons who were represented by [G&K] in connection with the Lockheed Litigation, except for those class members who settled their claims against [G&K]." The operative third amended complaint asserts a cause of action for fraudulent breach of fiduciary duty, and a common count for money had and received, based on G&K's alleged mishandling of settlement funds in the Lockheed Litigation. Among other things, the complaint alleges G&K breached its fiduciary duty by (1) failing to disburse to its clients their "rightful shares of the settlements"; (2) disbursing the settlement funds to third parties without the clients' "knowledge and consent"; (3) "[m]isrepresenting and/or concealing" its "wrongful conduct" from its clients; and (4) "[f]ailing to deal honestly and loyally with [its clients]."

On January 6, 2010, the trial court granted summary judgment in favor of G&K on Gutierrez's individual claims. The court ruled Gutierrez could not establish causation or damages against G&K because the statute of limitations barred his underlying claims in the Lockheed Litigation. Gutierrez appealed the ruling to this court. (See *Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925 (*Gutierrez I*).)

Notwithstanding the dismissal of Gutierrez's individual claims, the trial court found "the claims of the putative class may remain viable" and gave putative class counsel 45 days to find a substitute class representative. In an effort to find a new class representative, counsel made phone calls and sent unsolicited correspondence to hundreds of G&K's current and former Lockheed clients. The correspondence asserted G&K "wrongfully handl[ed] the settlement proceeds that they had obtained from various Defendants in the Lockheed litigation . . . by charging excessive costs and/or attorney's fees and by failing to provide proper accountings, among other things."

G&K moved for sanctions and to disqualify putative class counsel for contacting G&K's current clients. The trial court denied the request for sanctions and disqualification, but granted G&K a protective order (1) prohibiting putative class counsel from discussing the prosecution or merits of the Lockheed Litigation with G&K's current clients; and (2) requiring putative class counsel to submit for court approval all future written communication to putative class members.

On June 17, 2010, the trial court denied putative class counsel's motion to substitute three of G&K's existing Lockheed clients as class representatives. The court explained that it had "serious reservations concerning the potential for abuse of the class action procedure in the context of this litigation, which, in the Court's view, is driven by the conduct of Plaintiff's counsel." The court found that allowing G&K's existing Lockheed clients to act as class representatives "will clearly have the potential to create a conflict with the ongoing representation by [G&K] of the plaintiffs in the *Lockheed* litigation (the putative class members in the instant case)." The court continued, "Such a conflict may significantly impact the ability of [G&K] to continue representation of their existing clients in the decade-old *Lockheed* litigation" and "such a risk to the disruption of the existing attorney-client relationship . . . outweighs the potential benefit of the prosecution of the class claims in the instant litigation at the present time."

On April 27, 2011, this court reversed the summary judgment of Gutierrez's individual claims. In a partially published opinion we concluded that, unlike a typical attorney malpractice action, the merits of Gutierrez's claims in the underlying Lockheed

Litigation were irrelevant to whether G&K breached its fiduciary duty by mishandling its clients' settlement proceeds. (*Gutierrez I, supra*, 194 Cal.App.4th at p. 936.) Accordingly, we held the trial court erred in granting summary judgment on the ground that Gutierrez's underlying claims in the Lockheed Litigation were time barred. (*Id.* at pp. 936-937.)

3. *Belaire Notice Proceedings*

Following remand, in April 2012, Gutierrez filed a motion to compel discovery regarding the identity of putative class members. In opposition to the motion, G&K argued, among other things, that the requested discovery would violate the attorney-client privilege and interfere with the firm's relationship with its clients in the Lockheed Litigation.

The trial court issued an order approving a notice to putative class members pursuant to *Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App.4th 554 (*Belaire*).[2] After G&K filed a motion for reconsideration challenging various aspects of the *Belaire* order, the trial court issued an amended order directing a third party administrator to send notice to: "All persons who are no longer represented by [G&K] in connection with the Lockheed Litigation."

At the trial court's direction, G&K submitted several declarations identifying the firm's former Lockheed clients who should receive the *Belaire* notice. The initial declaration stated there were 26 former Lockheed clients who were no longer represented by the firm. However, in a subsequent declaration G&K explained that the correct figure was only 23, because three of its former clients had contacted the firm to advise that they still had an attorney-client relationship with G&K.

---

[2] The *Belaire* court approved an order (1) compelling the defendant to provide the names and contact information of all current and former employees, and (2) adopting a proposed notice that required those individuals to object in writing in order to prevent their personal information from being disclosed to the real parties in interest. (*Belaire, supra*, 149 Cal.App.4th at p. 556.) The appellate court concluded the opt-out notice was sufficient to protect the privacy rights of the potential class members. (*Ibid.*)

4. *Motion for Class Certification*

In February 2013, Gutierrez filed a motion for class certification. The motion sought to certify a class defined as: "All persons who were represented by [G&K] in connection with the Lockheed Litigation whose claims have been adjudicated or settled as to all of the defendants in the Lockheed Litigation, except for those class members who settled their claims against [G&K] or who are currently represented by [G&K]." The motion asserted there were "approximately 25 putative class members" in the proposed class, and that "the class members have already specifically been identified by [G&K] in connection with the *Belaire* Notice proceedings." Putative class counsel offered the only declaration in support of the motion. Neither Gutierrez nor any other putative class member furnished a supporting declaration.

G&K opposed class certification on several grounds, including lack of numerosity, commonality, adequacy of representation, typicality and superiority. The opposition included evidence that seven of the putative class members were deceased. G&K also submitted evidence showing that Gutierrez failed to disclose the instant lawsuit in a Statement of Financial Affairs he submitted in support of a bankruptcy filing in May 2009.

The trial court denied Gutierrez's motion for class certification, finding "the element of numerosity is weak, the element of adequacy of class representative is wholly lacking, and the elements of superiority and typicality are lacking."

In analyzing the numerosity and superiority requirements together, the court noted, "[w]hile a small class of 17, 24 or 25 members may meet technical minimums for class certification in California, the low number of potential class members also suggests that it may not be superior to lump all such claims into a class in lieu of allowing individual class members to litigate if and as they wish." With respect to superiority in particular, the court emphasized that "the claims here are uniquely personal as they invade the private province of the otherwise privileged attorney-client relationship." While "Gutierrez can waive [the] privilege for himself voluntarily," the court determined it should "proceed with caution" before effectively allowing Gutierrez to "open up the

private attorney-client relation for others." Further, in view of Gutierrez's inability to secure supporting declarations from putative class members after the *Belaire* process, the court reasoned an opt-out procedure might not necessarily ensure knowing and voluntary attorney-client privilege waivers by absent class members. Accordingly, the court concluded Gutierrez "failed to carry his burden of showing that there is sufficient numerosity to justify class treatment and also has failed to carry the burden of showing that class treatment is superior to claim-by-claim litigation."

DISCUSSION

1. *Standard of Review*

"Code of Civil Procedure section 382 authorizes class actions 'when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . .' The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. [Citation.]" (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).) The party also must demonstrate there are "substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).)

As " 'trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification.' " (*Sav-On, supra,* 34 Cal.4th at p. 326.) Thus, "in the absence of other error, a trial court ruling supported by substantial evidence generally will not be disturbed 'unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]' [citation]." (*Linder, supra,* 23 Cal.4th at pp. 435-436.) "[O]n appeal from the denial of class certification, we review the reasons given by the trial court for denial of class certification, and ignore any unexpressed grounds that might support denial." (*Kaldenbach v. Mutual of Omaha Life Ins. Co*. (2009) 178 Cal.App.4th 830, 843-844.) "We may not reverse, however, simply because *some* of the court's reasoning

was faulty, so long as any of the stated reasons are sufficient to justify the order." (*Id.* at p. 844.)

2. *The Trial Court Did Not Improperly Narrow the Class Definition*

As a threshold matter, Gutierrez challenges the trial court's order limiting *Belaire* notice to "All persons who are no longer represented by [G&K] in connection with the Lockheed Litigation." Gutierrez contends this ruling improperly "precluded" him from pursuing this action on behalf of G&K's existing clients and this error prejudicially tainted the court's superiority determination. The record does not support Gutierrez's claim.

Contrary to Gutierrez's premise, the subject order did not make a final determination as to the size or scope of a certified class, nor did it prohibit Gutierrez from seeking to certify a broader class in a subsequent class certification motion. The order exclusively concerned the group of Lockheed plaintiffs who would receive precertification notice of the lawsuit, and the procedure by which such individuals could opt out of having their contact information disclosed to putative class counsel. Nothing in the court's written order addresses class certification requirements or precludes Gutierrez from establishing those requirements for a more broadly defined class.

Gutierrez nevertheless contends the trial court's oral statements at a discovery hearing following entry of the amended *Belaire* order made absolutely clear that certification would be denied if the proposed class included G&K's current Lockheed clients. We are not persuaded. Though the court expressed serious reservations about the manageability of such a class, it made no final ruling on the issue.[3] At the same

[3] The subject statements were made in connection with argument concerning an interrogatory propounded by Gutierrez that potentially implicated communications with G&K's current clients concerning the Lockheed settlements. In questioning Gutierrez's counsel about the relevance of such information, the court admonished counsel that "if you keep trying to break out of the boundary to find a bigger class than 26, notwithstanding my view of what [the attorney-client privilege] requires, the only thing that will be manageable is to determine that the case can't be maintained as a class at all, whatsoever, and that will be the ruling, and it will at least simplify where we go next. Do what you want."

discovery hearing, the trial court made clear that the amended *Belaire* order "defined what in my view makes up the class that I *presently* am still inclined to allow to proceed, *that would be relevant for discovery, but nothing more.*" (Italics added.) This was consistent with the view expressed at the prior hearing on the amended *Belaire* order, at which the court stated its order was "for the limited purpose of determining whether [the putative class members] object to disclosing contact information to [putative class counsel] and Mr. Gutierrez."

We acknowledge the trial court's statements likely influenced Gutierrez's decision to limit his proposed class to only G&K's former clients; although, we also note that Gutierrez used the fact that these putative class members had "already specifically been identified by [G&K] in connection with the *Belaire* Notice proceedings" to establish the ascertainability element in his certification motion. Be that as it may, it is not the case, as Gutierrez contends, that he was forced to either accept the trial court's purported limitation or face an inevitable ruling relegating his claims to an individual action. On the contrary, Gutierrez could have moved to certify a subclass of G&K's current clients, without relinquishing his right to seek certification of a former client subclass as well. In doing so, Gutierrez would have preserved the issue for appeal by creating a record with evidence showing that, despite the trial court's stated concerns, a class that included G&K's current clients would not present insurmountable manageability issues. However, because he failed to do this, Gutierrez has not presented this court with an adequate record to establish the trial court's purported error. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295 [appellant bears the burden of presenting an adequate record to assess error].) As a matter of appellate process, we cannot say the trial court erred by failing to grant relief that Gutierrez never requested. (See, e.g., *Cryoport Systems v. CNA Ins. Cos.* (2007) 149 Cal.App.4th 627, 633; *Davis v. Nadrich* (2009) 174 Cal.App.4th 1, 8.)

3. *The Trial Court Reasonably Concluded a Class Action Would Not Be Superior to Individual Lawsuits*

"Because a class should not be certified unless 'substantial benefits accrue both to litigants and the courts' [citation]," a party seeking certification must demonstrate "a class action would be superior to individual lawsuits [citations]." (*Basurco v. 21st Century Ins. Co.* (2003) 108 Cal.App.4th 110, 120; *Brinker, supra,* 53 Cal.4th at p. 1021 ["The party advocating class treatment must demonstrate . . . substantial benefits from certification that render proceeding as a class superior to the alternatives"].) Along the same lines, " '[b]ecause group action also has the potential to create injustice, trial courts are required to " 'carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts.' " [Citation.]' " (*Newell v. State Farm General Ins. Co.* (2004) 118 Cal.App.4th 1094, 1101; *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 459.) "In deciding whether a class action would be superior to individual lawsuits, 'the court will usually consider [four factors]: [¶] [(1)] The interest of each member in controlling his or her own case personally; [¶] [(2)] The difficulties, if any, that are likely to be encountered in managing a class action; [¶] [(3)] The nature and extent of any litigation by individual class members already in progress involving the same controversy; [and] [¶] [(4)] The desirability of consolidating all claims in a single action before a single court.' " (*Basurco,* at p. 121.) In this case, the trial court was principally concerned with the first and fourth factors.

With respect to the potential benefits of group action, the trial court reasoned that the "low number of potential class members" made consolidating all the claims into a single action less desirable than "allowing individual class members to litigate if and as they wish." The court noted Plaintiff's assertion that the proposed class consisted of " 'approximately 25 putative class members' " and credited G&K's evidence showing "seven class members are now deceased . . . , leaving a class with only 17 members." In view of its experience with the asserted claims and the history of the case, the trial court found that trying "a dozen or 24 cases of individual plaintiffs is not an impossible burden

for the Court, especially since it is far from clear that most of such persons would initiate their own suits if class certification is denied." As to the latter point, the court noted that no putative class member had furnished a declaration in support of the motion, even though Gutierrez's counsel had class contact information and putative class members received notice of the action through the *Belaire* process. In light of this record, we find the trial court reasonably determined the benefits of litigating the case as a class action were minimal. (See, e.g., *Slakey Brothers Sacramento, Inc. v. Parker* (1968) 265 Cal.App.2d 204, 209 [class size totaling 22 members was "not large enough to cause great procedural obstacles" and, when "[c]ompared with their joinder as individual plaintiffs or plaintiffs in intervention, the class suit offer[ed] thin, if any, savings of time, labor and expense"].)

As for burdens, the trial court found that prosecuting the asserted claims as a class action would unacceptably intrude upon each class member's personal interest in maintaining the confidentiality of privileged communications with his or her attorneys. Because the asserted breach of fiduciary duty claim implicated duties G&K owed to its clients, the court reasoned that certification would effectively empower Gutierrez to waive the attorney-client privilege on behalf of absent class members to the extent necessary for G&K to defend the action. (See Evid. Code, § 958; *McDermott, Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378, 383-384 ["Generally, the filing of a legal malpractice action against one's attorney results in a waiver of the privilege, thus enabling the attorney to disclose, to the extent necessary to defend against the action, information otherwise protected by the attorney-client privilege"].) And, without any indication by way of a supporting declaration to show absent class members would have affirmatively and voluntarily waived the privilege on their own behalf, the court found Gutierrez failed to establish superiority. The court's analysis was legally sound and supported by the evidence.

"In the ordinary malpractice action brought by a client, the client may not sue for breach of the attorney's duties and also simultaneously prevent the attorney from defending himself by invoking the privilege. [Citation.] The holder of the privilege, the client, implicitly waives the privilege by filing such a suit." (*Kracht v. Perrin, Gartland & Doyle* (1990) 219 Cal.App.3d 1019, 1024, fn. 6, citing Evid. Code, § 958.) In the instant case, by contrast, the absent class members have not filed suit against G&K, nor have they taken any affirmative action upon which to premise an implied waiver. Nevertheless, under Gutierrez's proposed methodology, these absent class members will be presumed to have waived the privilege simply by failing to opt out of the class. Given the important interests advanced by the attorney-client privilege, the trial court reasonably considered the shortcomings of this passive waiver proposition in concluding a class action was not the superior method for adjudicating the small number of individual claims at issue. (See *Maas v. Municipal Court* (1985) 175 Cal.App.3d 601, 606 [observing attorney-client privilege safeguards the confidential relationship between attorney and client so as to promote full and open discussion of facts and legal tactics; analogizing waiver to that for psychotherapist-patient privilege, which "must be a voluntary and knowing act, done with sufficient awareness of the relevant circumstances and likely consequences"]; cf. *Los Angeles Gay & Lesbian Center v. Superior Court* (2011) 194 Cal.App.4th 288, 310 [holding "in an opt-out class action, merely by passively consenting to membership in the class" absent class members do not waive physician-patient privilege].)

Gutierrez posits that the privilege is a non-issue because G&K "made no showing that the prosecution of a class action against [G&K] for their misappropriation of settlement proceeds will in any way implicate the waiver of the privilege as to any other matter in which [G&K] may be representing the class member." The argument fails to establish reversible error.

Contrary to Gutierrez's premise that G&K was required to establish the extent of privileged communications potentially implicated, the trial court appropriately assigned the burden to Gutierrez, as the moving party, to establish the superiority of a class action. (See *Brinker, supra,* 53 Cal.4th at p. 1021.) In view of Gutierrez's claim that G&K breached fiduciary duties owed to its clients, the court properly required Gutierrez to demonstrate the proposed class action would not contravene absent class members' individual interests in maintaining the confidentiality of privileged communications with G&K in the Lockheed Litigation. As discussed, Gutierrez failed to furnish a supporting declaration addressing the extent of the privileged communications potentially implicated by his breach of fiduciary duty claim. Indeed, he offered no evidence to show absent class members would voluntarily agree to any waiver of the privilege, even one limited solely to communications concerning the distribution or use of settlement proceeds. For its part, G&K could not furnish such evidence, as it was barred, absent a waiver, from disclosing the contents of its privileged communications with its former clients.

The record supports the trial court's findings that the benefits of class treatment were minimal given the small class size, while the potential injustice from permitting passive attorney-client privilege waivers was significant. The trial court reasonably weighed these respective benefits and burdens in determining Gutierrez failed to establish class treatment would be superior to prosecuting the small number of claims on an individual basis. Because the lack of superiority is sufficient to affirm the order, we need not consider the trial court's other grounds for denying certification. (See *Hataishi v. First American Home Buyers Protection Corp.* (2014) 223 Cal.App.4th 1454, 1469.)

DISPOSITION

The order is affirmed. Girardi & Keese and Thomas Girardi are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

EDMON, P.J.

KLEIN, J.*

* Retired Presiding Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution..